No. 85-1277

In the Supreme Court of the United States

OCTOBER TERM, 1986

SCHOOL BOARD OF NASSAU COUNTY, FLORIDA, ET AL.,
PETITIONERS

v.

GENE H. ARLINE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which forbids discrimination in federally-assisted programs against an otherwise qualified handicapped individual "solely by reason of his handicap," makes unlawful discrimination based on concern about contagiousness.

2. Whether a person who is afflicted with the contagious, infectious disease of tuberculosis is precluded from being "otherwise qualified" for the job of elementary-school teacher, within the meaning of Section 504.

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INTEREST OF THE UNITED STATES

This case concerns the scope of the nondiscrimination mandate of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits discrimination on the basis of physical and mental handicaps in federally-assisted programs and activities. The United States has substantial responsibilities for enforcing Section 504. Pursuant to executive order, the Secretary of Health, Education, and Welfare promulgated regulations "establish[ing] standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504." Exec. Order No. 11,914, 41 Fed. Reg. 17871 (1976); see generally 45 C.F.R. Pt. 84.[1] In addition, the United States has substantial

[1] In 1980, the Secretary's responsibility was transferred to the Attorney General (Exec. Order No. 12,250, 45 Fed. Reg. 72995), and the regulations were "deemed to have been issued by the Attorney General." *Id.* at 72997; see 28 C.F.R. Pt. 41. The regulations require

compliance obligations under Section 501 of the Rehabilitation Act, 29 U.S.C. (& Supp. II) 791, not to engage in impermissible handicap discrimination. See generally 29 C.F.R. Pt. 1613. The outcome of this case will directly affect the enforcement responsibilities and compliance obligations of numerous federal agencies and recipients of federal funds. For this reason, the United States has participated as amicus curiae in other cases before this Court involving Section 504. See *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985); *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *University of Texas* v. *Camenisch*, 451 U.S. 390 (1981); *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979).

STATEMENT

1. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *" (29 U.S.C. 794). The Rehabilitation Act defines "handicapped individual" for purposes of Section 504 as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" (29 U.S.C. 706(7)(B)).[2] Accordingly, the Act's nondiscrimination

each federal agency to issue its own regulations concerning handicap discrimination in the programs and activities financially assisted by the agency. 28 C.F.R. 41.4.

[2] The definition of "handicapped individual" also provides that the term does not include a person who is an alcohol or drug abuser whose current use prevents him from performing the relevant job duties or poses a direct threat to the property or safety of others. 29 U.S.C. 706(7)(B).

mandate protects not only those who are presently handicapped, but also those who suffer discriminatory treatment because they are believed to have a handicap whether that belief rests on a history of past handicap or is a misperception with no basis at all.

2. Respondent Arline worked as an elementary school teacher for 13 years until April 1979 when the school board dismissed her because she had infectious, contagious tuberculosis (Pet. App. 2).[3] Arline first contracted tuberculosis at the age of 14 in 1956 after which the disease went into remission, until she suffered one relapse in 1977 and two additional relapses in 1978 (*ibid.*). The school board's action was based on the report of a state health official who, upon learning that she was suffering from infectious, contagious tuberculosis, recommended to the school board that she not be permitted to continue to teach a class of third-grade students full-time (J.A. 13, 48-51, 61-64, 80-81).

3. Arline brought suit in federal district court against the school board alleging, inter alia,[4] that the school board had impermissibly discriminated against her based on her handicap in violation of Section 504 of the Rehabilitation Act (Pet. App. 3). At trial, the state health official (upon whose report the school board had relied) testified that she had based her recommendation to the school board on the heightened susceptibility of young children to infectious, contagious tuberculosis, which can be transmitted by "[e]xhaling or respiration, coughing, sneezing, [and] breathing" (J.A. 13, 23). The official also testified that older persons would be less susceptible to the contagion (*id.* at 15). The school superintendent testified that he had

[3] References to the appendices to the petition for a writ of certiorari, which were not paginated, are based on our consecutive numbering of the pages.

[4] Respondent's due process claim under 42 U.S.C. 1983, which both courts below rejected, is not before the Court.

not considered the possibility of offering Arline alternative employment in the school system (*e g.*, as a teacher of older children or an administrative non-teaching position) because of the continuing risk Arline posed to the entire student population and to other school employees (*id.* at 53-55).

Following a non-jury trial, the district court ruled that Arline was not a "handicapped person" within the meaning of Section 504 (Pet. App. 14). The court reasoned that although Arline was unquestionably suffering from infectious tuberculosis, such an infectious disease did not fall within the statutory definition of handicap under the Act (*ibid.*). The court ruled, in the alternative, that even if infectious tuberculosis did constitute a handicap, the school board had satisfied its obligations under Section 504 (Pet. App. 14-15). According to the court, Arline was qualified only to teach elementary school and the school board was under no obligation to place her in employment elsewhere in the school system (*id.* at 15).

4. The court of appeals reversed and remanded on the ground that Arline was a "handicapped individual" within the scope of Section 504 (Pet. App. 7-9).[5] The court noted that tuberculosis "can significantly impair respiratory functions as well as other major body systems" and that even if Arline was not currently disabled by tuberculosis, the nondiscrimination mandate of Section 504 extends to individuals, such as Arline, who either had a "record of such impairment" or were "regarded as having such an impairment" (Pet. App 8). The court found no expressions of congressional intent, either in the language of the statute or its legislative history, to exclude contagious diseases from the scope of Section 504, and therefore held that

[5] The court of appeals also reversed the district court's ruling that Section 504 did not apply to petitioner because the school system was not a federally-assisted program or activity within the Rehabilitation Act. This Court denied the petition for a writ of certiorari on that issue.

contagious diseases were within the Act's scope (Pet. App. 8-9). The court, accordingly, remanded the case for further proceedings to make factual findings relevant to whether the school board could reasonably accommodate Arline by transferring her to a different position in the school system (*id.* at 10-11).

SUMMARY OF ARGUMENT

Section 504 of the Rehabilitation Act makes unlawful discrimination "solely by reason of * * * handicap" against "otherwise qualified handicapped individual[s]" in federally-assisted programs and activities (29 U.S.C. 794). Respondent argues, and the court of appeals held, that Section 504's nondiscrimination mandate extends to discrimination based on concern about contagiousness. In particular, respondent contends that petitioners, a county school board and school superintendent, violated Section 504 by dismissing respondent from her position as an elementary school teacher because she had contagious, infectious tuberculosis. We disagree.

1. Discrimination on the basis of contagiousness is not handicap discrimination within the meaning of Section 504. Section 504 bars discrimination against otherwise qualified handicapped individuals only when that discrimination is "solely by reason of * * * handicap" (29 U.S.C. 794). Section 504 does not purport to bar all discrimination, regardless of its basis, that might adversely affect handicapped individuals. Contagiousness is not itself a handicap, however, and consequently discrimination based on concern about contagiousness is not itself handicap discrimination. A handicap, within the meaning of Section 504, is a condition that is either actually physically or mentally disabling or mistakenly perceived to be physically or mentally disabling, measured in terms of the individual's physical or mental ability to accomplish certain daily tasks. An individual may be contagious in

respect to a serious, and sometimes disabling disease, however, without being physically or mentally disabled in any manner or being regarded by others as being physically or mentally disabled.

In the absence of any suggestion to the contrary in the statutory language or legislative history of the Rehabilitation Act, we cannot suppose, moreover, that Congress intended to equate "contagiousness" with "handicap." If "contagiousness" were a "handicap" the result would be to inject federal nondiscrimination principles into an area of public health law—federal and state regulation of communicable diseases—involving public policy issues of a wholly different nature than those considered by Congress in enacting Section 504. The myriad federal and state laws and programs that address the sensitive public health issues posed by communicable diseases would become subject to Section 504's nondiscrimination mandate. Nothing in the Rehabilitation Act's language or legislative history, however, suggests that Congress intended such a far-reaching result.

Nor is there any suggestion in the record that respondents' dismissal of Arline was a mere pretext for handicap discrimination. The record in this case clearly establishes that the school board's sole motivation was to protect persons in the school system, particularly highly susceptible young students, from the health risks posed by Arline's contagiousness. In addition, the school board's determination that Arline was contagious was plainly not rooted in a false stereotypical judgment about any handicap, as handicap is defined in Section 504. The school board's determination neither carried implications at all regarding nor derived in any way from the disabling effects of her disease.

2. Even if discrimination based on contagiousness constitutes handicap discrimination under the Rehabilitation Act, Arline's complaint should be dismissed because she was not, as required by Section 504 (see 29 U.S.C. 794),

"otherwise qualified" to retain her elementary school teaching position. The record clearly demonstrates, and the district court found, that the contagious nature of her tuberculosis rendered her unqualified to continue to teach early grades of elementary school. The reasonable accommodation obligation of Section 504 does not, moreover, require the school board to provide Arline with a different job in the school system where she might pose less of a health risk to others (*e.g.*, as a teacher of older students or a non-teaching school administrator). In the employment context, the employer's accommodation obligations pertain only to the qualifications of a handicapped individual for a particular job. Section 504 does not require an employer to hire a handicapped person because he may be unqualified for *other* jobs or, conversely, hire him for a different job because he is unqualified for his current position. Providing Arline with a job elsewhere in the school system, either as a teacher of older students or a non-teaching administrator, would be tantamount to hiring her in a different capacity and, hence, is not required by Section 504.

ARGUMENT

THE SCHOOL BOARD DID NOT VIOLATE SECTION 504 OF THE REHABILITATION ACT BY DISMISSING AN ELEMENTARY SCHOOL TEACHER AFFLICTED WITH CONTAGIOUS, INFECTIOUS TUBERCULOSIS BECAUSE DISCRIMINATION ON THE BASIS OF HER CONTAGIOUSNESS DID NOT CONSTITUTE HANDICAP DISCRIMINATION AND BECAUSE, IN ANY EVENT, THE TEACHER WAS NOT "OTHERWISE QUALIFIED" TO RETAIN HER POSITION

This case concerns the question whether the nondiscrimination mandate of Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on the contagious nature of a potentially disabling illness. The general purpose of the Rehabilitation Act was to

"develop[] the opportunities for all individuals with handicaps to live full and independent lives." *Community Television* v. *Gottfried,* 459 U.S. 498, 508 (1983); *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 626 (1984). To that end, Section 504, adopting language virtually identical to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*,[6] makes unlawful discrimination "solely by reason of * * * handicap" against "otherwise qualified handicapped individual[s]" in federally-assisted programs and activities (29 U.S.C. 794).

"Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), slip op. 7 (footnote omitted). Congress concluded that both widespread societal ignorance of, and indifference to the needs of the physically and mentally handicapped as well as stereotypical judgments (including benign, but paternalistic judgments) about their abilities had resulted in a denial of equal opportunities to handicapped individuals. S. Rep. 93-1297, 93d Cong., 2d Sess. 50 (1974); 118 Cong. Rec. 525 (1972) (remarks of Sen. Humphrey); 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik); see also 124 Cong. Rec. 30327 (1978) (remarks of Sen. Dole). Congress enacted Section 504 to require consideration by federal grantees of both the actual needs and abilities of handicapped individuals to the extent necessary to "assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from programs receiving federal assistance" (*Alexander* v. *Choate*, slip op. 16). In furtherance of this objective, Congress amended the law in 1974 to extend the Act's nondiscrimination mandate to include not only those

[6] Title VI proscribes discrimination on the basis of race, color, or national origin in federally-assisted programs. 42 U.S.C. 2000d.

persons actually suffering from a handicap, but also those persons discriminated against based on the mistaken belief that they are handicapped (29 U.S.C. 706(7)(B)).

In interpreting Section 504, this Court has "respon[ded] to two powerful but countervailing considerations—the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds" (*Alexander* v. *Choate*, slip op. 11; *United States Department of Transportation* v. *Paralyzed Veterans*, No. 85-289 (June 27, 1986), slip op. 13). In particular, the Court has rejected invitations to extend Section 504 to programs that are not themselves recipients of federal financial assistance, but "are 'inextricably intertwined' with an institution that [is]" (*Paralyzed Veterans*, slip op. 13), to interpret Section 504 "to reach all action[s] disparately affecting the handicapped" and thus to seek to guarantee the handicapped "equal results" with the nonhandicapped (*Choate*, slip op. 10-11, 16), or to hold that Section 504 requires employers to disregard physical or mental limitations caused by a handicap in determining whether a handicapped individual is "otherwise qualified" for participation in the particular federal program or activity at issue (*Southeastern Community College* v. *Davis*, 442 U.S. at 405-407).

In this case, respondent proposes and the court of appeals held that discrimination on the basis of contagiousness constitutes discrimination on the basis of a handicap in violation of Section 504. We submit that such a construction of Section 504 would, like those rejected in the earlier cases, extend the Rehabilitation Act's nondiscrimination mandate beyond what Congress contemplated and, in effect, impose a legislative scheme for dealing with a class of serious and difficult problems which Congress has not addressed. In particular, respondent's construction of Section 504 would inject its nondiscrimination principles into an area of public health

law—federal and state regulation of communicable diseases—involving public policy issues of a wholly different nature than those considered by Congress in enacting Section 504. Federal and state governmental actions taken in response to the public health risks posed by communicable disease would, as in this case, be subject to charges of handicap discrimination. These charges of discrimination would, in turn, have to be resolved without the benefit of any congressional guidance as to how to balance the competing societal concerns at stake.

In this and every other case in which a contagious person brings a Section 504 action, a federal funding agency or a federal court would have to determine whether the contagious individual was "otherwise qualified" for the activity from which he was excluded. Federal agencies would have to make medical judgments about the risk of contagion in particular settings and balance the risk of the spread of disabling diseases against the interest of the contagious individual. To keep the nondiscrimination mandate of Section 504 "within manageable bounds," and to avoid erosion of Section 504's central mission under the pressure of a class of cases it was not meant to solve, this Court should reverse the judgment of the court of appeals.

A. The School Board Did Not Violate Section 504 Because It Did Not Discriminate Against Arline On The Basis Of A Handicap

1. Section 504, like the nondiscrimination mandates in other civil rights laws, makes unlawful discrimination *based on* certain criteria. See *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979) (footnote omitted) (Section 504 "indicat[es] only that mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context"); *Alexander* v. *Choate*, No. 83-727 (Jan. 9, 1985), slip op. 9; S. Rep. 93-1297, 93d Cong., 2d Sess. 39 (1974) (Section 504 "constitutes the establishment of a broad government policy that programs receiving Federal financial assistance

shall be operated without discrimination *on the basis of handicap*") (emphasis added). Section 504 does not bar all discrimination adversely affecting a handicapped person, but only discrimination "solely by reason of his handicap" (29 U.S.C. 706(7)(B)). For example, discrimination based on above or below average stature, even when its victims include blind or hearing-impaired individuals who are unquestionably "handicapped," is not discrimination "solely by reason of * * * handicap" barred by Section 504.[7]

Of course, a federal grantee or federal agency cannot avoid Section 504's nondiscrimination mandate simply by positing that its decision was based not on a handicap, but on some other ground. When the posited ground for discrimination is a mere pretext for handicap discrimination, Section 504 bars the discriminatory treatment. Cf. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981) ("the plaintiff must * * * have an opportunity to prove * * * that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination") (citation omitted). In addition, if the federal grantee's sole reason for assuming that an individual possesses the characteristic justifying discriminatory treatment is that the individual is handicapped, Section 504 would similarly be violated. For example, although a federal grantee may exclude applicants to a federal program on a genuine but mistaken belief that they are incompetent, if the grantee bases its determination of incompetence *on the fact* that the applicant is

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[7] We must stress that although Section 504 may not forbid certain nonhandicap-based discrimination by recipients of federal financial assistance, such conduct may violate other federal or state laws more directly concerned with the particular program or activity at issue. Hence, just as Section 504 does not make unlawful all irrational or unjustified actions taken by federal recipients, neither does 504 condone such conduct.

handicapped, he violates Section 504. Forbidding such false handicap-based stereotypical judgments is a primary purpose of Section 504.

2. The school board's threshold defense to this action is not, contrary to the court of appeals' apparent assumption (Pet. App. 7-9), that contagious diseases cannot constitute "handicaps" within the meaning of Section 504, no matter how physically disabling they might be. An individual who is disabled with an infectious, contagious disease surely may be a "handicapped individual" within the meaning of the Rehabilitation Act. Instead, the school board claims that discrimination based on contagiousness is not itself discrimination based on a handicap, even though persons with physical handicaps may be among those adversely affected by the discrimination. We agree. Because Section 504 makes unlawful only discrimination against handicapped individuals *based on their actual or perceived handicaps,* Arline can maintain an action under Section 504 only if one of two circumstances is present: (1) the basis of the school board's action—contagiousness—is itself a handicap under the Act, or (2) the school board's determination that Arline is contagious is a mere pretext for handicap discrimination or is based on a false, stereotypical judgment solely relating to an actual or perceived handicap.[8] Our reading of the record in this

[8] The record in this case does not clearly establish that the disabling effects of Arline's relapses of tuberculosis would be sufficient to make her a "handicapped individual" within the meaning of Section 504. Because we conclude, however, that the school board's dismissal of Arline was not based on such disabling effects, we may assume, without reaching the fact-bound issue, that the disabling effects of Arline's tuberculosis are, have been classified to be, or have been perceived by others to be sufficiently severe to make her a "handicapped individual" under the Act. See 29 U.S.C. 706(7)(B). That the extent of any physical disability actually suffered by Arline is wholly irrelevant to the Section 504 inquiry in this case underscores the inappropriateness of characterizing her contagiousness as a handicap.

case, in light of the statutory language, relevant legislative history, and implementing federal regulations, compels the conclusion that Arline's claim must fail as a matter of law.[9]

3. The Rehabilitation Act does not define "handicap" per se, but through its definition of "handicapped individual"[10] makes plain that only conditions that either are in fact or are perceived to be physically or mentally *disabling* constitute "handicaps" for the purposes of the federal rehabilitation law.[11] A condition is disabling if it impairs an individual's physical and mental ability to accomplish certain daily tasks. Contagiousness is, therefore, not itself a "handicap" within the meaning of the Rehabilitation Act. An individual may be contagious in respect to a serious and sometimes disabling disease without himself being physically or mentally disabled in any manner and without being regarded by others as being physically or mentally disabled in any manner.

[9] The Department of Justice Office of Legal Counsel recently issued an opinion concerning the applicability of Section 504 to discrimination in federal programs against individuals who suffer from (or are regarded as suffering from) Acquired Immune Deficiency Syndrome (AIDS) and related conditions. It is our understanding that petitioners have lodged a copy of the Office of Legal Counsel opinion with the Court.

[10] See 45 C.F.R. 84.3(*l*) (" 'Handicap' means any condition or characteristic that renders a person a handicapped person.").

[11] Our reading of the Rehabilitation Act's definition of "handicapped individual" comports with the ordinary meaning of the term "handicap," both expressed in *Webster's Third New International Dictionary* 1027 (1981) (defining "handicap" as "a disadvantage that makes achievement unusually difficult; *esp.*: a physical disability that limits the capacity to work"), and reflected in this Court's decisions. See, *e.g., Southeastern Community College* v. *Davis,* 442 U.S. at 413 ("a refusal to accommodate the needs of a *disabled* person amounts to discrimination") (emphasis added).

When Congress first enacted the Rehabilitation Act in 1973, the Act provided one definition of "handicapped individual" for the entire Act, including Section 504. The 1973 Act defined handicapped individual as "any individual who (A) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (B) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to * * * this Act." Pub. L. No. 93-112, § 7(6), 87 Stat. 361. The congressional objective in the 1973 enactment was to provide persons suffering from a "physical or mental disability" both vocational rehabilitation and training (see S. Rep. 93-318, 93d Cong., 1st Sess. 8-10, 21 (1973); see also H.R. Rep. 93-244, 93d Cong., 1st Sess. 9 (1973)) and protection from discrimination in federal programs (see, *e.g.*, 118 Cong. Rec. 525 (1972) (remarks of Sen. Humphrey); 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik)). There is no indication in the legislative history of the 1973 enactment that congressional concern with handicapping conditions extended to conditions, such as contagiousness, which leave an individual physically and mentally unimpaired, but cause him to pose a risk to others.

Congress amended the definition of "handicapped individual" in 1974, for the purposes of Section 504, to mean "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment" (29 U.S.C. 706(7)(B)). As described in the accompanying Senate Report, the amendment reflects Congress's conclusion that the 1973 definition too "narrowly limited" the scope of Section 504 by tying the concept of handicap to employability. S. Rep. 93-1297, 93d Cong., 2d Sess. 37-38 (1974). The new definition, accordingly, defines handicap more broadly to include disabling conditions that limit

"major life activities" (*i.e.*, caring for one's self, * * * walking, seeing, hearing, speaking, breathing, learning, and working" (45 C.F.R. 84.3(j)(2)(ii)). In addition, the new definition reflects the congressional determination that handicap discrimination can occur in circumstances when the individual is mistakenly believed to be handicapped. S. Rep. 93-1297, *supra*, at 38.

The 1974 amendment, without explanation, also used the word "impairment" for the first time, substituting for "disability" the phrase "impairment which substantially limits one or more of such person's major life activities" (29 U.S.C. 706(7)(B)). The plain meaning of this language and the legislative backdrop of this amendment dispel any suggestion that Congress intended this new terminology to include a health condition, like contagiousness, which is not itself disabling. The new language, like the predecessor term "disability," does not readily extend to the concept of contagiousness.[12] An individual who is contagious is not

[12] The ordinary meaning of "impair" is "to make worse: diminish in quantity, value, excellence, or strength: do harm to." *Webster's Third New International Dictionary* 1131 (1981). The remainder of the statutory language makes clear that it is impairment of one's ability to engage in major life activities that is at issue. See 45 C.F.R. 84.3(j)(2)(i) (defining "[p]hysical or mental impairment" as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the * * * body systems" or "any mental or psychological disorder"); 45 C.F.R. 84.3 (j) (2)(ii) (defining "major life activities" as "caring for one's self, * * * walking, seeing, hearing, speaking, breathing, learning, and working"). Cosmetic disfigurement may be an anomalous element in the illustrative list supplied in the HHS regulation, except as the disfigurement is regarded, rightly or wrongly, as implying an impairment in the strict sense. Discrimination motivated by an aversion to a cosmetic disfigurement would not, absent a perceived or actual nexus to a disabling condition, constitute handicap discrimination under Section 504. In contrast, if a federal program manager discriminated against an individual actually physically disabled—such as a person confined to a wheelchair—because the manager had an aversion to the individual's handicap, he would clearly have violated Section 504. See 117 Cong. Rec. 45974 (1971) (remarks of Rep. Vanik).

necessarily physically or mentally "impaired" in ability to perform major life activities any more than he is physically or mentally "disabled."[13] Both impairment and disability—particularly as the terms are utilized in the Rehabilitation Act—imply an inability to perform certain physical or mental functions.[14]

Even more fundamentally, to read "impairment" to include contagiousness would expand the scope of the Rehabilitation Act into entirely new areas of public health law, and do so in the absence of any suggestion that Congress intended such a result. If contagiousness is an "impairment" that "substantially limits major life activities," then the myriad federal and state laws and programs that address the sensitive public health issues posed by com-

[13] The Social Security Act, 42 U.S.C. 423 (d)(1) (A) defines the term "disability" as meaning the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *."

[14] As a general matter, the terms "impairment," "disability," and "handicap" tend to be used interchangeably and their true meaning in any particular context is revealed by the presence of other modifying words and the purposes of the particular statute in which the terms are used. See generally, R. Burgdorf, Jr., *The Legal Rights of the Handicapped Persons: Cases, Materials, and Text* 14 (1980). In the Rehabilitation Act, the statutory requirement that to constitute a "handicap" a "physical or mental impairment" must limit a major life activity implies that the impairment must adversely affect an individual's ability to perform a physical or mental task. See *de la Torres* v. *Bolger,* 610 F. Supp. 593, 596 (N.D. Tex. 1985) (left handedness is not an impairment because "impairment cannot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength"), aff'd, 781 F.2d 1134, 1138 (5th Cir. 1986); see also *Jasany* v. *United States Postal Service,* 755 F.2d 1244, 1248-1250 (6th Cir. 1985) (crossed-eyes not an impairment that substantially affects a major life activity); *Tudyman* v. *United Airlines,* 608 F. Supp. 739 (C.D. Cal. 1984) (muscular build is not a handicapping condition).

municable diseases become subject to Section 504's nondiscrimination mandate. Traditional state programs would become subject to Section 504, as would state and federal programs designed to prevent the spread of certain diseases by limiting the activities of infected persons.[15]

Had Congress intended Section 504 to apply to discrimination based on the risk of contagion, we would expect some indication of that purpose in the statute or its legislative history. Cf. *Alexander* v. *Choate,* slip op. 11. There is nothing, however, in the statutory language or legislative history of the Rehabilitation Act that even

[15] From 1796 to the present, Congress has enacted laws authorizing the executive branch to take action to curb the spread of communicable diseases, including quarantines, scientific research, and assisting and cooperating with state legislative efforts. See 42 U.S.C. 243, 264 and 42 U.S.C. (& Supp. II) 247b; Act of Feb. 25, 1799, ch. 12, 1 Stat. 619 *et seq.* (an Act respecting Quarantines and Health Laws); Act of May 27, 1796, ch. 31, 1 Stat. 474 *et seq.* (an Act relative to Quarantine); see generally, Morgenstern, *The Role of the Federal Government in Protecting Citizens from Communicable Diseases,* 47 U. Cin. L. Rev. 537 (1978); see also Walz, *Federal Regulation of Quarantine,* 4 Mich. L. Rev. 189 (1905). Similarly, state legislatures and their predecessors have long been concerned with the regulation of communicable diseases and today typically have enacted laws pursuant to their broad police powers providing for reporting of the occurrence of certain communicable diseases, closing of public places, quarantines, and the denial of marriage licenses based on the presence of certain diseases, and compulsory immunization to prevent their spread. See, *e.g.,* Ariz. Rev. Stat. Ann. §§ 36.621-36.623 (1986) (reporting requirement); Conn. Gen. Stat. Ann. §§ 19a-207, 19a-221 (West 1986) (quarantines); Fla. Stat. Ann. §§741.051-741.053 (West Supp. 1986) (marriage licenses); Idaho Code §§ 39-4801—39-4802 (1985) (compulsory immunization); 1798-1821 R.I. Pub. Laws 38 (quarantine of persons afflicted with smallpox); Vt. Rev. Stat. ch. 36 (1797) (same); Act of Quarantine, ch. II, 1722 Va. Acts 99 (Hening) (quarantine of incoming ships from areas infected with plague); see also Morgenstern, *supra,* 47 U. Cin. L. Rev. at 545 n.62 ("By September 1976, 47 of the 50 states required at least one type of immunization prior to school entry.").

remotely suggests that Congress contemplated the possibility that Section 504 would apply to federal and state efforts to control the risks presented by contagiousness, including the type of action taken by the school board in this case. Indeed, federal legislative enactments strongly suggest that Congress has approached separately the two public policy issues—assisting the handicapped and preventing the spread of contagion—presumably because the latter raises a host of public health questions not implicated by the former.

In *Bowen* v. *American Hospital Ass'n,* No. 84-1529 (June 9, 1986), this Court declined to extend Section 504 so as " 'to make major inroads [in a matter implicating the states'] longstanding discretion' " in the absence of a clear indication of congressional intent (slip op. 30 (quoting *Alexander* v. *Choate,* slip op. 19)). Yet this would be precisely the effect of extending Section 504 to decisions based on the fact that an individual has a communicable disease. In the absence of any indication of congressional intent to the contrary, we believe "Congress * * * '[should] not be deemed to have significantly changed the federal-state balance' " (*Bowen* v. *American Hospital Ass'n,* slip op. 32, quoting *United States* v. *Bass,* 404 U.S. 336, 349 (1971)). This conclusion is particularly compelling in a case such as this one where the federal obligations apply to states only upon acceptance of federal funds and, therefore, it is necessary "that Congress speak with a clear voice, [so as to] enable the [s]tates to exercise their choice knowingly, cognizant of the consequences of their participation" (*Pennhurst State School* v. *Halderman,* 451 U.S. 1, 17 (1981)).

Hence, while the 1974 amendment increased the scope of the concept of "handicap" to include both actual and perceived disabling conditions, and in the process substituted new terminology, the core of the concept remained, for the purposes of federal law, a disabling condi-

tion. See generally S. Rep. 93-1297, *supra,* at 37-39, 50, 63-64. An individual who is contagious in respect to a serious, potentially disabling disease is not necessarily "disabled" or "impaired" himself and, consequently, even when he is impaired, discrimination solely on the basis of his contagiousness is not itself discrimination on the basis of his handicap.

4. To be sure, contagiousness may also lead to a disabling condition and, hence, a handicap.[16] In addition, a person who is contagious may, either on his own initiative or due to the reactions of others towards his contagiousness, be sharply restricted in his social and professional activities. Neither of these circumstances, however, suggests that contagiousness is itself a handicap for the purposes of Section 504 of the Rehabilitation Act.

a. The possibility that an individual's contagiousness may cause a disabling condition in others does not, without more, render discrimination on the basis of an individual's contagiousness the legal equivalent of discrimination on the basis of a handicap possessed by the individual, as required by Section 504. Cf. *Bowen* v. *American Hospital Ass'n,* No. 84-1529 (June 9, 1986), slip op. 19 (emphasis in original) (plurality opinion) ("If, pursuant to its normal practice, a hospital refused to operate on a black child whose parents had withheld their consent to treatment, the hospital's refusal would not be based on the race of the child even if * * * the parents based *their decision* * * * [on] the race of the child"). The contrary view—that a causal connection between contagiousness and a disabling condition is sufficient to trigger Section 504—would suggest quite incorrectly that a federal re-

[16] Accordingly, discrimination on the basis of contagiousness is distinct from discrimination based on a human characteristic, such as stature (see page 11, *supra*), that is in most instances wholly unrelated to the presence of a handicap.

cipient would violate Section 504 by discriminating against a nonhandicapped individual because the latter had caused a third person to become handicapped.[17]

b. Nor does the fact that a contagious individual may be sharply restricted in his interactions with others, who are reluctant to deal with him, render contagiousness a handicap under Section 504. Section 504 is not intended to redress the full variety of human characteristics that may result in sharply restricted lives or in discriminatory treatment. It is only discrimination based on an actual or perceived handicap, and not all types of discrimination triggered by unfavorable societal attitudes towards a human characteristic, that is entitled to protection under the Rehabilitation Act. Otherwise, a host of personal characteristics that others might find offensive or even threatening—ranging from personal hygiene or appearance to a propensity for criminal or violent conduct—would constitute handicaps. Section 504 would, in effect, ban discrimination based on any attitude that restrains the opportunities of each person to live a full and productive life. Whatever the merits of such a regime, it was plainly not enacted by Section 504. See 45 C.F.R. Pt. 84, App. A, at 310 ("[O]nly physical and mental handicaps are included. Thus, environmental, cultural, and eco-

[17] In the hypothetical described, the actual handicap induced in a third person triggers the discriminatory treatment, while in this case, discrimination is based merely on the *fear* of inducing such a handicap in third persons. Discrimination on the basis of a fear of third persons' becoming disabled, however, is not the equivalent of discrimination on the basis of an actual or perceived handicap in the person discriminated against. Cf. *Metropolitan Edison* v. *People Against Nuclear Energy*, 460 U.S. 766, 775 (1983) (emphasis in original) ("[A] *risk* of an accident is not an effect on the physical environment. A risk is, by definition, unrealized in the physical world.").

nomic disadvantage are not in themselves covered.").[18] Section 504 focuses on one and one problem only—discrimination against physically and mentally handicapped persons on the basis of their (actual or perceived) handicaps.[19]

5. Because contagiousness is not itself a handicap within the meaning of the Rehabilitation Act, Arline can maintain an action under Section 504 only if the school board's decision to dismiss her was either (1) a mere pretext for handicap discrimination or (2) based on a false stereotypical judgment, condemned by Section 504, solely relating to a handicap. The record in this case, however, supports neither proposition.

[18] The Department of Health and Human Services regulations, which most agencies have adopted verbatim, define the statutory phrase "is regarded as having such an impairment" (29 U.S.C. 706(7)(B)(iii)) as meaning that an individual is handicapped if he "has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment" (45 C.F.R. 84.3(j)(2)(iv)(B)). If read to provide that the impairment need not itself limit major life activities or be perceived to limit major life activities in order to constitute a "handicap," this definition would plainly extend impermissibly beyond the bounds of the statute, which refers to an "impairment which substantially limits one or more of such person's major life activities" (29 U.S.C. 706(7)(B)(i)). Because, however, contagiousness is not a "physical or mental impairment" in the first instance, the validity of this regulatory definition need not be reached in this case.

[19] This conclusion cannot be avoided by a disparate impact analysis that looks to the impact on the disabled tuberculosis sufferers of discrimination based on contagiousness. This Court has "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504" (*Alexander* v. *Choate*, slip op. 11 & n.19), and, assuming Section 504 reaches some instances of disparate impact, has focused only on disparate impacts resulting from failure to make reasonable accommodations to provide meaningful access to the handicapped (slip op. 11-14). Under the Court's reasoning, disparate impact analysis might invalidate the failure to eliminate architectural barriers because such failure would deny meaningful access to handicapped individuals. Where there is no denial of meaningful

First, the record in this case does not suggest that contagiousness was a mere pretext for discrimination based on any disabling effects of Arline's tuberculosis. The school board dismissed Arline, who had been a teacher in the school system for 13 years, only after she suffered her third relapse and the school board learned she was contagious. Pet. App. 2; J.A. 48-51, 61-64, 80-81. The school board's sole concern was the health risk posed by her to persons in the school system, particularly to young students (*ibid.*) There is no suggestion in the record that the school board singled out Arline for discriminatory treatment because she was or was perceived to be physically disabled by tuberculosis.[20]

Second, the school board's dismissal of Arline was plainly not rooted in the type of false stereotypical judgment about the abilities of handicapped individuals deemed impermissible by Section 504 (see pages 11-12, *supra*). The risks of contagiousness may exist wholly apart from the potentially disabling effects of a disease like tuberculosis, and a belief that an individual is contagious—whether reasonable or not—need not depend on a perception that an individual is disabled by reason of a disease. In this case, the school board's belief in Arline's contagiousness was in no sense a conclusion drawn from a perception that she was disabled by tuberculosis. Thus, this case is different from those involving a person in a wheelchair or a blind person who is, on that account, falsely stereotyped as being unable to perform certain tasks.[21] This case is also distinct from the case—clearly covered by Section 504—of an actually handicapped person who suffers antipathy simply based upon his handicap. Here, the school board's decision rested directly on facts indicating her contagiousness, which itself is neither a handicap nor a stereotyped conclusion based on a handicap. The school board relied on a report of a state health official who recommended that Arline not be permitted to continue teaching elementary school and acted pursuant to its perceived obligation to protect the school system from the health hazards presented by serious communicable diseases.[22]

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access (*id.* at 14-18), or, *a fortiori*, where there is no handicap and therefore no duty of reasonable accommodation, the showing of disparate impact has no legal significance under Section 504. As explained in the text above, contagiousness is not a handicap and, consequently, there is no duty of reasonable accommodation applicable to it.

[20] In at least this one respect, this case differs from *New York State Ass'n for Retarded Children* v. *Carey*, 612 F.2d 644, 649 (2d Cir. 1979), in which the court of appeals declared unlawful efforts by school officials to segregate retarded children with hepatitis B virus from other children, without making any comparable effort to segregate nonretarded children who also carried the contagious virus. See also *District 27 Community School Bd.* v. *Bd. of Education*, 130 Misc.2d 398, 415, 502 N.Y.S.2d 325 (1986) ("if the policy were to have been the exclusion of children diagnosed as having AIDS while not excluding children with ARC or those merely infected with the HTLV-III/LAV virus, it would constitute discrimination under section 504 of the Rehabilitation Act").

[21] The more difficult issue, not raised in this case, is whether Section 504 bars discrimination based on a false stereotyped conclusion derived solely from the fact that the person is handicapped, which false conclusion does not concern the impairment of the performance of major life activities. Would, for example, a federal program manager be proscribed from discriminating against a person in a wheelchair on the genuine though wholly unreasonable belief, derived solely from his handicap, that he was contagious in respect to some imagined "wheelchair" disease? Such a stereotype would not concern ability to perform major life activities. It would, however, derive directly *and solely* from the presence of the disability. This issue is not presented in this case because the record makes clear that the school board's belief in Arline's contagiousness was not a conclusion, stereotyped or otherwise, based solely on any disability which she may have had.

[22] Of course, the reasonableness of a claim that an individual is contagious is highly relevant to the Section 504 inquiry. For instance, the less reasonable the fear of contagion, the less credible is the assertion that fear of contagion was anything but a pretext for handicap

B. Arline Was Not "Otherwise Qualified" To Be An Elementary School Teacher Within The Meaning Of Section 504

Even if discrimination on the basis of contagiousness is handicap discrimination under Section 504, Arline's complaint should be dismissed because she was not "otherwise qualified" to be an elementary school teacher, as required by Section 504 . The statutory requirement that the handicapped individual must be "otherwise qualified" in order to maintain a Section 504 claim expressly acknowledges the commonsense notion that in certain circumstances a particular disability may justify discriminatory treatment. See *Southeastern Community College* v. *Davis,* 442 U.S. 397, 405-407 (1979). As this Court noted in *Alexander* v. *Choate, supra,* "the handicapped typically are *not* similarly situated to the nonhandicapped" (slip op. 10 (emphasis added)).[23]

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discrimination. Cf. *Knickerbocker Merchandising Co.* v. *United States,* 13 F.2d 544, 546 (2d Cir. 1926) (Hand, J.). But once a finding of pretext is negated and it is established that the determination that the individual is contagious is not handicap-based (see note 21, *supra*), the Section 504 inquiry comes to an end.

[23] Application of the "otherwise qualified" limitation, however, requires some threshold scrutiny of the purported "qualifications" of the relevant federal program or activity to ensure that those qualifications are not themselves the product of discrimination, based either on affirmative animus or misguided stereotypes. Otherwise, past discrimination would, in effect, justify continued discrimination, contrary to congressional intent. For "[i]t is possible to envision situations where an insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program" (*Southeastern Community College* v. *Davis,* 442 U.S. at 412). Hence, although Section "504 is concerned with discrimination and with discrimination alone" and " 'neither the language, purpose, nor history of [Section] 504 reveals an intent to impose an affirmative-action obligation' on recipients of federal financial assistance" (*Bowen* v. *American Hospital Ass'n,* No. 84-1529 (June 9, 1986), slip op. 29 (plurality opinion) (quoting *Southeastern Community College* v. *Davis,* 442

The court of appeals erred in holding that remand was necessary in this case both to determine whether Arline was "otherwise qualified" to retain her position as an elementary school teacher and to consider whether the school board must accommodate her contagiousness by employing her in a different capacity in the school system. In our view, the current record leaves no doubt that Arline was not "otherwise qualified" for her teaching position and remand on that issue is, accordingly, unnecessary. Arline was not "able to meet all of [her employment responsibilities] in spite of [her contagiousness]" (*Southeastern Community College* v. *Davis,* 442 U.S. at 406); nor was the school board obliged to find her some other employment in the school system where she would be qualified.

The state health official, the school superintendent, and the school board all determined (J.A. 13, 48-51, 61-64, 80-81), and the trial court expressly found (Pet. App. 14-15), that the health risks presented by Arline's contagiousness made her unqualified to continue teaching elementary school. In light of the uncontroverted testi-

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U.S. at 411)), Section 504's guarantee of equal and evenhanded treatment may require some efforts at accommodation. See *Alexander* v. *Choate,* No. 83-727 (Jan. 9, 1985), slip op. 12-14. For this reason, federal regulations implementing Section 504 invariably link assessment of the qualifications of a handicapped individual to a requirement that a federal grantee or federal agency reasonably accommodate the needs of handicapped persons or otherwise remove unnecessary impediments to their participation or employment. See 45 C.F.R. 84.3(k)(1), 84.12(a), 84.22, 84.23, 84.44; see also 29 C.F.R. 1613.702(f), 1613.704 (guidelines on Section 501 (29 U.S.C. (& Supp. II) 791) prohibition on handicapped discrimination in federal employment). The "reasonable accommodation" obligation imposed by these regulations, however, does not require " 'fundamental' or 'substantial' modifications to accommodate the handicapped" (*Alexander* v. *Choate,* slip op. 12 (quoting *Southeastern Community College* v. *Davis,* 442 U.S. at 410, 412-413)).

mony in the record regarding the contagious nature of Arline's affliction and the heightened susceptibility of young children (see J.A. 4-43), we see no basis for second-guessing either the school board's assessment of the health risks presented (cf. *Youngberg* v. *Romeo,* 457 U.S. 307, 322-323 (1982)) or its determination that those risks were unacceptably high. Certainly, Section 504 does not bar the school board from considering the public health risks associated with continued employment of Arline. See *Southeastern Community College* v. *Davis,* 442 U.S. at 409; *Strathie* v. *Department of Transportation,* 716 F.2d 227, 232 (3d Cir. 1983); *Doe* v. *New York University,* 666 F.2d 761, 776 (2d Cir. 1981); see also 29 C.F.R. 1613.702 (f) (" 'Qualified handicapped person' means * * * a handicapped person who * * * can perform the essential functions of the position in question without endangering the health and safety of * * * others.").[24]

Finally, the court of appeals erred in remanding for further proceedings to consider whether the school board might reasonably accommodate Arline's "handicap" by employing her in some different capacity in the school system (*e.g.*, as a teacher of older students) (Pet. App. 10-11). Although Section 504 may require some reasonable accommodation of the needs of the handicapped (see note 23, *supra)*, that accommodation obligation does not extend to employing Arline in a *different* capacity. Teaching older students would be a different job.

Section 504's nondiscrimination mandate requires only that covered employers provide handicapped individuals with "evenhanded" treatment and does not require that

[24] The statutory definition of "handicapped individual" expressly provides that safety concerns are relevant to discrimination against alcoholics and drug abusers by excluding such persons from Section 504 coverage when they "constitute a direct threat to * * * the safety of others" (29 U.S.C. 706(7); see also 124 Cong. Rec. 30323-30324 (1978) (remarks of Sen. Williams)).

they receive "preferential" treatment. See *Alexander* v. *Choate,* slip op. 16; see *Bowen* v. *American Hospital Ass'n,* slip op. 29-30. "Evenhanded treatment" does not, moreover, mean that an employer must under the guise of "accommodation" hire a handicapped person because he may be unqualified for *other* jobs (or, conversely, hire him for a different job because he is unqualified for his current position). Accommodation obligations pertain only to the qualifications of a handicapped individual for a particular job.[25] Such preferential treatment is, however, precisely what the court of appeals erroneously ordered the district court to consider in this case on remand.

[25] The exclusive focus of implementing agency regulations is on reasonable accommodation to allow the handicapped individual to "perform the essential functions *of the job in question*" and not with reasonable accommodations that provide the individual with a different job. See 45 C.F.R. 84.3(k)(1) (emphasis added); see also 45 C.F.R. Pt. 84, App. A, at 312. Notably, federal regulations implementing the federal government's obligation, as employer, not to discriminate on the basis of handicap similarly define "qualified handicapped individual" in terms of the "position in question." See 29 C.F.R. 1613.702(f); *Carty* v. *Carlin,* 623 F. Supp. 1181, 1188-1189 (D. Md. 1985) ("The Rehabilitation Act and its accompanying regulations indicate that the law requires reasonable workplace modification or accommodation in order to allow the handicapped person to remain in that position. There is nothing in the law or accompanying regulations to suggest that reasonable accommodation requires an agency to reassign an employee to another position.").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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